Editor's note: modified in Jerry Kelly v. BLM, 131 IBLA 146 (Oct. 31, 1994)

DALE D. SMITH

v.

BUREAU OF LAND MANAGEMENT

IBLA 91-467 Decided May 25, 1994

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer affirming a final decision by the Kingman Resource Area Manager, Bureau of Land Management, cancelling a grazing permit and preference within the Dolan Springs Allotment. AZ-02-90-02.

Affirmed.

1. Grazing Permits and Licenses: Base Property (Water): Ownership or Control--Grazing Permits and Licenses: Base Property (Water): Transfers

   The Bureau of Land Management may properly cancel a grazing permit and preference where the record shows that the operator transferred deeded land and the base property water rights for an allotment; that the deeded land and water rights were pledged as security for a loan issued by the Farmers Home Administration; and that upon foreclosure of that loan, ownership of the base property was transferred to the Farmers Home Administration.

APPEARANCES: Mark S. Bryce, Esq., Safford, Arizona, for appellant;
Richard R. Greenfield, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Dale D. Smith has appealed from a decision of Administrative Law Judge Harvey C. Sweitzer, dated August 15, 1991, affirming the February 28, 1990, decision of the Kingman Resource Area Manager, Bureau of Land Management (BLM), cancelling Smith's grazing permit and preference within the Dolan Springs allotment because he no longer owned or controlled the base property, which consisted of certain water rights. The Area Manager concluded that the Farmers Home Administration (FmHA), Department of Agriculture, was the owner of the base property due to a superior deed of trust. The Area Manager stated that the grazing permit and preference would be issued to FmHA.

In accordance with 43 CFR 4160.4, Smith filed an appeal of the Area Manager's decision. Judge Sweitzer conducted an evidentiary hearing on September 13 and 14, 1990, in Phoenix, Arizona, and, thereafter, issued
the decision which is the subject of the present appeal.

Judge Sweitzer's decision succinctly sets forth the evidentiary facts in this case as follows:

> In 1980, Appellant Smith sold his interests in the Dolan Springs Ranch, which consisted of deeded lands, State leased lands, and base property with its attached Federal grazing preference for the Dolan Springs Allotment, to Toby and Kitty Sloan. See Exhibit G-4, copy of Smith/Sloan joint tenancy deed recorded at Mohave County Recorder at Book 634, pages 836-837. Mr. Sloan acquired financing to the extent feasible from FmHA via a $92,000 Deed of Trust, and funded the remaining purchase price of $160,000 by a second Deed of Trust from appellant. See Exhibit G-2, FmHA/Sloan trust deed, recorded at Mohave County Recorder at Book 634, pages 838-842, and Exhibit G-3, Smith/Sloan trust deed, recorded at Book 634, pages 843-846.
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> The record indicates that the Sloans did not pay under either trust deed. See testimony of [Joe] Velut [Chief of Farmers Program, FmHA, Phoenix, Arizona], Tr. II, p. 158, l. 12-13, for FmHA/Sloan trust deed; and testimony of Smith, Tr. I, p. 43, l. 6-7, for Smith/Sloan trust deed. In 1983, the Sloans filed for bankruptcy. See testimony of Smith, Tr. I, p. 43, l. 9-11. Respondent claims that FmHA was forestalled by a legal moratorium placed on foreclosures during the early and mid-1980's. In this context, respondent contends that appellant was able to foreclose on his second trust deed without hindrance from FmHA. See testimony of Velut, Tr. II, p. 148, l. 1-3, and Exhibit G-9, trustee's deed upon sale, recorded: December 8, 1983, at Book 982, pages 140-142. After the trustee's sale in favor of the appellant, FmHA contacted appellant to inquire whether appellant would assume the Sloan debt under the FmHA/Sloan Deed of Trust. Appellant did not respond. See Exhibits G-10, G-11, and G-12, and testimony of Velut, Tr. II, p. 162, l. 5-23. Appellant sought and was issued the Dolan Springs Allotment grazing preference and permit, on the basis of this trustee's deed upon sale. See testimony of Smith, Tr. I, p. 46-47, 23-25, l. 1-4.
>
> When the moratorium on foreclosure was lifted, FmHA foreclosed upon their Deed of Trust, resulting in issuance of a trustee's deed upon sale to FmHA in August 1987. See Exhibit G-13. Following recordation of the trustee's deed upon sale, FmHA applied to the BLM for the Dolan Springs Allotment grazing preference and permit. See Exhibits G-16, G-17, and G-18. Based on the official Mohave County records and information provided with

> the application, the BLM Area Manager determined that FmHA owned the base property and so decided to cancel appellant's grazing permit and preference and issue them to FmHA. See Exhibits G-19, G-23, and G-24.

(Decision at 2-3).

At the hearing, Judge Sweitzer stated that the parties had agreed that the issue in the case was: "Who owns or controls the base property to which the grazing preference in the Dolan Springs Allotment is attached?" (Tr. 6; see Decision at 2). 1/ Based on his analysis of the evidence presented, he concluded that Smith failed to show that he owned or controlled the base property. He also rejected Smith's apparent claim of fraud based on an alleged unauthorized switching of attachments to Exhibit G-4 (the Smith/Sloan joint tenancy deed recorded at Mohave County Recorder at Book 634, pages 836-837) and/or in the execution or recordation of Exhibits G-2 and G-3 (the FmHA/Sloan deed of trust, recorded at Mohave County Recorder at Book 634, pages 838-842, and the Smith/Sloan deed of trust, recorded at Book 634, pages 843-846, respectively). He concluded that Smith failed to show clear and convincing evidence of fraud.

On appeal to this Board, appellant complains that the purpose of the hearing in this case was to allow Judge Sweitzer to make an independent decision on the facts presented, and that he violated due process by applying a deferential standard of review and by failing to decide the case in a timely manner. Appellant further argues that "the court unjustifiably and arbitrarily and capriciously disregarded the clear evidence of the case" by failing to take into consideration the testimony of Dwight Beard, County Supervisor for the FmHA in Kingman, Arizona, who testified that his recollection of the agreement between FmHA and Smith was that FmHA would obtain a first lien on the deeded land, but that Smith would retain a security interest in the base property (Notice of Appeal at 2).

In response, BLM replies that Judge Sweitzer applied the proper standard of review and that there is no applicable regulation, custom, or practice dictating that decisions be issued within a certain time period. BLM asserts that there was no violation of appellant's due process rights.

1/ Departmental regulations at 43 CFR 4110.2-1(d) specify:

"If a permittee or lessee loses ownership or control of all or part of his/her base property, the permit or lease, to the extent it was based upon such lost property, shall terminate immediately without further notice from the authorized officer. * * * When a permit or lease terminates because of a loss of ownership or control of ownership or control of a base property, the grazing preference shall remain with the base property and be available through application and transfer procedures at 43 CFR 4110.2-3, to the new owner or person in control of the base property."

BLM maintains that Judge Sweitzer's decision is supported by the facts in evidence, and that those facts are well-documented in his decision by cited references to exhibits and testimony taken at the September 1990 hearing. BLM further argues that appellant's assertions on appeal that Beard agreed with appellant's version of the agreement is not sufficiently persuasive to overturn Judge Sweitzer's decision, which is based upon the "best evidence" in the case, which is the documentary evidence itself.

We have thoroughly reviewed the record in this case and the arguments advanced by appellants and BLM. Judge Sweitzer's decision set forth a complete summary of the testimony and other relevant evidence, as well
as the applicable law. We agree with Judge Sweitzer's findings and conclusions and adopt them as our own. A copy of his decision is attached. We add only the following.

We find no basis for Smith's claim of violation of his due process rights and conclude that Judge Sweitzer applied the applicable burden of proof and standard of review in the case. On appeal of the Area Manager's decision, Judge Sweitzer conducted an evidentiary hearing and in his decision he stated that Smith had the burden to provide substantial evidence that the Area Manager's decision was arbitrary, capricious, or erroneous as a matter of law. He indicated that in order to establish that the decision was arbitrary or capricious it would be necessary to show that it was not supportable on any rational basis or that it did not substantially comply with the grazing regulations, citing Saval v. Bureau of Land Management,
119 IBLA 202, 208 (1991); Fasselin v. Bureau of Land Management, 102 IBLA 9, 14 (1988); and Webster v. Bureau of Land Management, 97 IBLA 1, 3-4 (1987).

In addition, there was no due process violation because Judge Sweitzer issued his decision 11 months after the hearing. First, the record shows that appellant did not complete his briefing of the case until 3 months after the hearing. Second, there is no controlling statute or regulation which establishes a time limit on the issuance of Administrative Law Judge decisions in grazing cases.

[1] Finally, appellant claims that Judge Sweitzer ignored evidence establishing the intent of the parties and that, despite the recorded instruments, Smith maintained a priority lien on the base property. Appellant states that "Mr. Beard, the FmHA officer, unequivocally stated that it was the intent of all the parties that Dale Smith have the first lien rights on the grazing preference and on the water rights. The water rights are the base property" (Notice of Appeal at 2). Contrary to appellant's assertion, Judge Sweitzer did not ignore that testimony. Rather, he gave it little weight when viewed in light of the other evidence presented in the case. Appellant has shown no error.

Judge Sweitzer agreed with appellant that when construing contracts
for the sale of land, the intent of the parties should be taken into consideration. However, Judge Sweitzer correctly stated the law that in considering such intent, the first place to look is the document itself. In this

case, the recorded Smith/Sloan joint tenancy deed (Exhibit G-4) lists deeded land and the base property water rights. The recorded FmHA/Sloan deed of trust (Exhibit G-2) also lists the same lands and water rights set forth
in Exhibit G-4. The Smith/Sloan deed of trust (Exhibit G-3), which was recorded immediately following Exhibit G-2, also lists the same land
and water rights, but by its terms it is expressly made subject to the FmHA/Sloan deed of trust. To counter this evidence, appellant offered an unrecorded Smith/Sloan deed (Exhibit A-7), which listed for conveyance only the deeded land, and certain testimony, including that of Beard, that only the deeded land was meant to be conveyed by Smith. Judge Sweitzer correctly concluded that to the extent Smith was attempting to show fraud in the preparation and recordation of the pertinent documents, he had failed to do so.

We agree with Judge Sweitzer's conclusion that FmHA had a first lien on the deeded land and the base property water rights and that upon foreclosure by FmHA on its deed of trust, it received a trustee's deed upon sale which included the water rights and the attached grazing preference.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision of Administrative Law Judge Sweitzer is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
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August 15, 1991

DALE D. SMITH,	:	AZ-02-90-02
Appellant	:	Appeal from the Area Manager's Final Decision
v.	:	dated February 28, 1990,
BUREAU OF LAND MANAGEMENT,	:	Kingman Resource Area, Phoenix District, Arizona
Respondent	:	

DECISION

Appearances: Mark S. Bryce, Esq., Bryce & Udall, Stafford, Arizona, John C. Hughes, Esq., Phoenix, Arizona, for appellant;

Richard R. Greenfield, Esq., Phoenix, Arizona, for respondent.

Before: Administrative Law Judge Sweitzer

This is a proceeding under the Taylor Grazing Act of 1934, as amended, 43 U.S.C. 315 et seq.; the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1901 et seq.; and the grazing regulations issued pursuant thereto and set forth at 43 CFR Subchapter D, Part 4100. The public land involved is the Dolan Springs Allotment, Kingman Resource Area, Phoenix District, Arizona.

This case involves an appeal by Dale D. Smith from a final decision issued February 28, 1990, by the Bureau of Land Management (BLM) Area Manager for the Kingman Resource Area. The decision terminated Mr. Smith's grazing permit and preference, because he was found to no longer own or control the base property. The Area manager's decision also

concluded that Farmers Home Administration (FmHA), as the rightful owner of the base property, would be issued the Dolan Springs Allotment grazing permit and preference upon cancellation of Smith's interest. The decision was timely appealed by Mr. Smith and the matter was heard on September 13-14, 1990 in Phoenix, Arizona. Both parties submitted posthearing briefs, which have been fully considered.

Issue

The central issue is: who owns or controls the base property to which the grazing preference in the Dolan Springs Allotment is attached? Appellant also contended that another agreement existed that was not represented by the documents in the case. Because appellant's contention is really a sub-issue of the central issue, only the central issue will be addressed.

Background

In 1980, Appellant Smith sold his interest in the Dolan Springs Ranch, which consisted of deeded lands, State leased lands, and base property with its attached Federal grazing preference for the Dolan Springs Allotment, to Toby and Kitty Sloan. See Exhibit G-4, copy of Smith/Sloan joint tenancy deed recorded at Mohave County Recorder at Book 634, pages 836-837. Mr. Sloan acquired financing to the extent feasible from FmHA via a $92,000 Deed of Trust, and funded the remaining purchase price of $160,000 by a second Deed of Trust from appellant. See Exhibit G-2, FmHA/Sloan trust deed, recorded at Mohave County Recorder at Book 634, pages 838-842, and Exhibit G-3, Smith/Sloan trust deed, recorded at Book 634, pages 843-846.

The record indicates that the Sloan did not pay under either trust deed. See testimony of Velut, Tr. II, p. 158, 1. 12-13, for FmHA/Sloan trust deed; an testimony of Smith, Tr. I, p. 43, 1. 6-7, for Smith/Sloan trust deed. In 1983, the Sloan's filed for bankruptcy. See testimony of Smith, Tr. I, p. 43, 1. 9-11. Respondent claims that FmHA was forestalled by a legal moratorium placed on foreclosures during the early and mid-1980's. In this context, respondent contended that appellant was able to foreclose on his second trust deed without hindrance from FmHA. See testimony of Velut, Tr. II, p. 148, 1. 1-3, and Exhibit G-9, trustee's deed upon sale, recorded: December 8, 1983, at

Book 982, pages 140-142. After the trustee's sale in favor of the appellant, FmHA contracted appellant to inquire whether appellant would assume the Sloan debt under the FmHA/Sloan Deed of Trust. Appellant did not respond. See Exhibits G-10, G-11, and G-12, and testimony of Velut, Tr. II, p. 162, 1. 5-23. Appellant sought and was issued the Dolan Springs Allotment grazing preference and permit, on the basis of his trustee's deed upon sale. See testimony of Smith, Tr. I, p. 46-47, 23-25, 1. 1-4.

When the moratorium on foreclosure was lifted, FmHA foreclosed upon their Deed of Trust, resulting in issuance of a trustee's deed upon sale to FmHA in August 1987. See Exhibit G-13. Following recordation of the trustee's deed upon sale, FmHA applied to the BLM for the Dolan Springs Allotment grazing preference and permit. See Exhibits G-16, G-17, and G-18. Based on the official Mohave County records and information provided with the application, the BLM Area Manager determined that FmHA owned the base property and so decided to cancel appellant's grazing permit and preference and issue them to FmHA. See Exhibits G-19, G-23, and G-24.

Discussion

The general authority of the Secretary of the Interior with respect to the management of Federal range lands is set forth in the Taylor Grazing Act of 1934, as amended, 43 U.S.C. section 315 et seq.:

> The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of [federal range lands] and he shall . . . do any and all things necessary to accomplish the purposes of this chapter . . . namely, to regulate their occupancy and use.

43 U.S.C. section 315a.

Thus, the management of the Federal range is committed to the discretion of the Secretary, who had redelegated its management to the Area Manager. This redelegation is not in question here. Appellant bears the burden of showing by substantial evidence that the Area Manager's decision is arbitrary, capricious, or clearly erroneous as a matter of law.[1] The decision may be regarded as arbitrary and

[1]The "substantial evidence" standard of proof requires the appellant to make a "clear showing of error." Dorius v. Bureau of Land Management, 83 IBLA 29, 37 (1984). Thus the substantial evidence standard of proof appears to be comparable to the "clear and convincing" standard of proof imposed in other administrative settings.

capricious only if it is not supportable on any rational basis or if it does not substantially comply with the grazing regulations. Joe Saval Co. v. Bureau of Land Management, 119 IBLA 202, 208 (1991); Fasselin v. Bureau of Land Management, 102 IBLA 9, 14 (1988); Webster v. Bureau of Land Management, 97 IBLA 1, 3-4 (1987).

Appellant contends that he owns or controls the base property to which the grazing preference is attached. He maintains that he retained control of the base property and attached grazing preference throughout the sale transaction executed with Toby Sloan and FmHA in May of 1980. Appellant testified that the parties agreed that FmHA would have first lien on the deeded land and second lien on the State and Federal grazing allotments and the right to water cattle; with appellant having first lien on the grazing and water rights. Appellant claims the two Deeds of Trust were to be executed to reflect this intention, and that correspondence from Lawyers Title of Arizona, the escrow agency, gave a specific description of this transaction.

The recorded Deeds of Trust do not reflect the intent as described above. Both Deeds of Trust recorded at the Mohave County Recorder describe the same deeded land and water springs located on the deeded land. According to testimony, these water rights constitute the base property for the grazing allotment. There is also a separate listing of State and Federal grazing rights on the last page of recorded Smith/Sloan Deed of Trust, which appellant claims is a description of the property held by appellant under a first lien. Appellant stated in his opening brief that his understanding of Arizona case law is that grazing and water rights can be severed from the land. But the Case appellant relied upon refers only to range-use rights and not specifically to Federal and State grazing permits. Phoenix Title and Trust Company v. J.M. Smith and Winnie E. Smith, his wife, and Dale D. Smith, 101 Ariz. 101, 416 P.2d 425 (1966). Furthermore, the Phoenix Title case provides that a fee simple title will be presumed to have been conveyed unless a lesser estate is granted, conveyed or devised by express words. Id. The reservation of rights or easements in the agreement of sale must be clear and unambiguous, and the grantor's intent must be ascertainable, neither of which conditions exist in the instant case. The attachment to the Smith/Sloan deed does not contain the specific

unambiguous language necessary to create a reservation in favor of appellant.

Moreover, even if the deed contained the appropriate language, it would not detach the grazing preference and permit from the base property. Although grazing permits may be used as security for loans, they may not be separated from the base property that serves as their basis. See 43 CFR 4130.8 and 4110.2-2(b). Furthermore, 43 CFR 4110.2(b) provides that grazing permits carry no right, title, or interest in any lands or resources held by the United States. If, as in this case, the base property is transferred without retaining a legal right of control of the property, as by lease, the transferee loses the grazing preference which remains attached to the base property until application and transfer procedures are completed.

The recorded documents clearly demonstrate the intent to convey the deeded land with its attendant water rights to Sloan. The recorded Smith/Sloan Deed of Trust contains language indicating it is "subject to 1980 taxes and the first Deed of Trust in favor of the United States of America acting through FmHA recorded this date." This would indicate that the FmHA deed had priority in security interests over the Smith/Sloan deed. Appellant contends that the recorded deed was changed and executed without his knowledge, and offers that the title company had responsibility for changing the documents without his knowledge, and then having them recorded in Mohave County.

Since appellant appears to be arguing that there was fraud through the unauthorized switching of attachments for Exhibit G-4 and/or in the execution or recordation of Exhibits G-2 and G-3, the applicable standard of proof is clear and convincing evidence. See, e.g., Gallegos v. Garcia, 480 P.2d 1002, 14 Ariz. App. 85 (Ariz. App. 1971); and Stewart v. Woodruff, 19 Ariz. App. 190, 505 P.2d 1081 (Ariz. App. 1973). This standard has not been met. In contradiction of his allegation of fraud, appellant contends that the title company fully understood the sale agreement between the parties and documented it in their letter of May 22, 1980. See Exhibit A-3, and testimony of Smith, Tr. I, p. 42, l. 1-9. Furthermore, appellant subsequently foreclosed on the water rights that were listed in Exhibit G-3, the recorded Smith/Sloan Deed of Trust, but not in the unrecorded Deed of Trust that appellant proposed as an exhibit. See Exhibits G-3, A-7. Appellant had no substantive explanation as to the discrepancy, and said that there had been no separate writing signed by himself and Sloan that memorialized their agreement. See testimony of Smith, Tr. I, p. 63, l. 9-10. Appellant then testified, on

redirect examination, that the recorded Smith/Sloan Deed of Trust, Exhibit G-3, was in fact his (appellant's) Deed of Trust, detailing the water rights that he later foreclosed upon. See testimony of Smith, Tr. I, p. 82, l. 18-25; p. 83, l. 1. Based on the foregoing, appellant has failed to meed the standard of clear and convincing evidence of fraud.

Based upon appellant's testimony that the recorded Smith/Sloan Deed of Trust is accurate, and also upon the language in the deed giving priority to the FmHA/Sloan Deed of Trust, the FmHA/Sloan Deed of Trust takes precedence in ownership or control of base property and attached permits. And although appellant's view appears to be that the FmHA/Sloan trust deed, by failing to separately identify the grazing permit and preference, cannot be used as a basis from which to claim said grazing interests, the case is otherwise. The FmHA/Sloan deed stated that Sloan conveyed the deeded land and water rights to FmHA in consideration for their loan, "with all rights, interests, easements, hereditament and appurtenances thereunto belonging." This is in keeping with FmHA's lending practice of taking first security position on all property encumbered in a loan transaction. While, as appellant claims, contracts for the sale of land should be interpreted in accordance with the intentions of the parties, the first point of reference in considering the intention is the "four corners" of the instrument. See e.g., Wise v. Watts, 152 C.C.A. Ariz. 195, 239 F. 207 (C.C.A. Ariz. 1917), cert. denied, 224 U.S. 661 (the paramount objective in the construction of a deed is to give effect to the intention of the parties, which is to be gathered from a consideration of the entire instrument read in light of the facts and circumstances under which it was executed). The facts and circumstances in which Exhibits G-2, G-3, and G-4 were executed include the 1979 FmHA appraisal by Mr. Beard, Exhibit G-5. In the appraisal, the value of the deeded land was given at $65,625, while the overall appraisal amount was $92,000, with the $26,375 difference reflection the water right valuation assigned. It appears conclusive that, in the initial sale transaction, it was the parties' intention that FmHA had first lien on the deeded land, as well as on the water rights that serve as the base property for the grazing permits. Thus, when FmHA foreclosed upon their deed of trust and was issued a trustee's deed upon sale, the water rights and attached grazing preference were rightfully theirs. The BLM is bound by the applicable regulations at 43 CFR 4110.2 to honor the application of the party who owns the base property, and must act to cancel a grazing permit when an operator loses ownership or control of the base property. See 43 CFR 4110.2-1(d).

Appellant's claim that FmHA should be estopped from applying for the grazing permit and preference in alleged contravention of their earlier position is not supported by the evidence. Appellant's main form of support for his claim, the letter from the title company, contains no official approval from either FmHA or BLM and thus cannot be considered legally binding on either agency. Furthermore, that issue, as well as the issue of whether FmHA is a suitable party to hold a grazing permit, is not applicable to the outcome of this appeal. At issue only is whether appellant owns or controls the base property upon which the grazing permit is based. The evidence indicated that he does not. Thus, the Area Manager's decision to cancel appellant's grazing preference and permit was not arbitrary, capricious, or erroneous as a matter of law.

Conclusion

By virtue of the FmHA/Sloan Deed of Trust, FmHA holds superior title to the water rights which serve as the base property upon which the Dolan Springs Allotment grazing preference is based. The existence of a second Deed of Trust encumbering the same water rights and listing appellant as beneficiary, does not give appellant a stronger position that FmHA. Appellant has failed to show by substantial evidence that the Kingman Resource Area Manager's final decision was arbitrary, capricious, or clearly erroneous as matter of law. In accordance with the foregoing, that final decision is affirmed and the appeal dismissed.

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

Any party adversely affected by this decision has the right of appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures).